RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-341

In the Supreme Court of the United States

TC HEARTLAND LLC,
D/B/A HEARTLAND FOOD PRODUCTS GROUP,
Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* OF EIGHTEEN INDIVIDUALS AND ORGANIZATIONS REPRESENTING INVENTORS AND PATENT OWNERS IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or amicus represented by me is: Guy Fielder, Jon D. Paul, Network-1 Technologies, Inc.; Neurografix; Paul Morinville, Scientific Telecommunications, LLC, and US Inventor, Inc.; National Innovation Association; Independent Inventors of America; San Diego Inventors Forum; Edison Innovators Association; Inventors Society of South Florida; Tampa Bay Inventors Council; Inventors Network of the Carolinas; Inventors Network of the Capital Area; North Florida Inventors and Innovators Group; Inventors Network of Minnesota; and United Inventors Association.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are: N/A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: None appeared in the trial court. Brian D. Ledahl appears in this court for amici.

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INTEREST OF *AMICI CURIAE*

Amici curiae are inventors, patent owners, and non-profit organizations representing inventors.[1] They possess rights granted to them by the United States Patent and Trademark Office pursuant to the Patent Act (Title 35 of the United States Code), and Section 8 of Article I of the United States Constitution. These patents provide the exclusive right to make, use, sell or offer for sale the inventions claimed therein for a set period of time. All too often, however, others trespass upon the rights of *amici curiae* and other holders of United States Patent rights. A patent holder's sole means of enforcement of its rights is through a suit for patent infringement. Petitioner and its supporting *amici* seek to change the law to dramatically curtail the ability of a patent holder to vindicate its rights. The changes to the law advocated by Petitioner and its supporting *amici* would impose significant burdens on inventors and their assignees, and would encourage infringing behavior and piracy.

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[1] Pursuant to Supreme Court Rule 37, all parties to this matter have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief. Pursuant to Supreme Court Rule 37, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund preparing or submitting this brief. No person or entity, other than *amici*, their members, or their counsel, contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The patent system "added the fuel of interest to the fire of genius." These words, spoken by Lincoln and carved into the façade of the U.S. Department of Commerce, reflect the understanding of the founders that patents and inventors play a critical role in the economic life of the United States. To read the briefs of Petitioner and the *amici* supporting it, however, one might think that inventors are a modern scourge to be eliminated. Their briefs collectively ask this Court to reach beyond merely interpreting a federal statute (which clearly does not support the relief sought), and instead to legislate new policy with the express goal of making it more difficult for inventors and patent owners to vindicate their rights in the interest of benefitting those who infringe upon those rights. This case is not about frivolous or non-meritorious claims. Rather, it is about where meritorious claims of infringement may be heard. Petitioners ask this Court to change the settled rules governing patent venue contrary to the express language of the governing federal statutes.

The patent venue statute, 28 U.S.C. § 1400, provides that a corporation may be sued for infringement in any district where it resides. Congress expressly defined residency for all venue purposes in 28 U.S.C. § 1391, but Petitioner urges this Court to ignore the unambiguous language used by Congress in favor of a tortured interpretation unsupported by the clear statutory language. Petitioner asserts that this Court, in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) decided the question presented before,

i.e. whether 28 U.S.C. § 1391(c) defines residency for purposes of 28 U.S.C. § 1400(b). This allegation ignores the plain fact that Congress amended 28 U.S.C. § 1391 since *Fourco* was decided in 1957.

28 U.S.C. § 1400(b) governs venue for suits alleging patent infringement. That provision provides that "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." The Petition addresses itself to the first clause, and specifically the reference to a judicial district where the defendant resides. Petitioner and its *amici* argue that a corporation or other fictitious business entity "resides" only in the state of its incorporation. But Congress rejected this very argument when it amended Section 1391(c) in 2011 to state that: "**For all venue purposes** - . . . (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question . . . ." 28 U.S.C. § 1391(c) (emphasis added).

Not only do Petitioner's arguments conflict with clear statutory language, but they would create unintended, yet dramatic results depriving patent holders throughout the United States of their property rights. Most notably, under Petitioner's argument, a foreign defendant not incorporated in the United States, and with no regular and established place of business in the United States, would not be the subject

of proper venue for a suit for patent infringement in any court in the United States – hardly a result Congress would have intended – to immunize foreign infringers against U.S. Patents and encourage all infringers to take their business outside the United States. Ordinarily, this apparent dilemma would be resolved by resort to 28 U.S.C. § 1391(c)(3), which provides for venue over defendants not resident in the United States. But the Petition argues that no part of Section 1391 may be considered in determining venue for an action for patent infringement.

Petitioner and its *amici* attempt to justify the requested departure from Congress's clear venue enactments with policy arguments that ask the Court to usurp the role of the legislature. Petitioners and their *amici* attack one district court in particular, the U.S. District Court for the Eastern District of Texas as somehow acting improperly. They suggest, contrary to any evidence, that the Eastern District of Texas engages in some form of "forum selling." In fact, the statistics show that outcomes in that district are not more favorable to patent holders, though the District's experience and expertise with such cases has made it a more efficient forum. In the end, however, such considerations are not for this Court as they reflect policy judgments, not the proper basis for statutory interpretation.

ARGUMENT

I. CONGRESS DEFINED "RESIDENCY" FOR ALL VENUE PURPOSES

Congress enacted a universal definition of residency for all venue purposes. In 2011, Congress amended 28 U.S.C. § 1391(c) to define residency "for all venue purposes." Petitioner and its *amici* argue that this definition by Congress should not apply to one venue provision – that found 28 U.S.C. § 1400. Petitioner's argument suffers from at least two flaws, each of which is fatal. First, it conflicts with the plain language of Section 1400. Second, Petitioner's argument for a different interpretation relies exclusively on a Supreme Court decision of 1892 that, to the extent it retained any force, was overruled by Congress's 2011 amendment to Section 1391(c).

A. Congress Expressly Defined Residency Contrary to Petitioner's Arguments

In 2011, Congress enacted various amendments to 28 U.S.C. § 1391. One such amendment was to change Section 1391(c) to recite express definitions for residency. The subsection begins by reciting, as to all three subsections, that it applies "[f]or all venue purposes." Section 1400 provides the specific venue provision applicable to patents, copyrights and mask works. Section 1400(a), applicable to copyrights and mask works, recites that venue is proper "in the district in which the defendant or his agent **resides** or may be found." (emphasis added). Section 1400(b), applicable to patents, recites that venue is proper "in the judicial district where the defendant **resides**, or where the defendant has committed acts of

infringement and has a regular and established place of business." (emphasis added). This language parallel is not a coincidence. Gugliuzza, Paul R. and La Belle, Megan M., "The Patently Unexceptional Venue Statute" (February 9, 2017). American University Law Review, Vol. 66, 2017 Forthcoming at 24. Available at SSRN: https://ssrn.com/abstract=2914091, citing *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) and *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotations omitted). No portion of Section 1400 provides any express definition of "resides." The only definition provided by Congress is found in Section 1391(c), which expressly applies "for all venue purposes."

In 2011, Congress had many choices in amending venue statutes. It chose to enact a provision, Section 1391(c), to expressly define "resides" for "all venue purposes." The House Report on the 2011 amendments states explicitly that the definitions in Section 1391(c) apply "universally," meaning "to all venue statutes, including venue provisions that appear elsewhere in the United States Code." Gugliuzza and La Belle at 23, citing H.R. Rep. No. 112-10 at 17 (2011). The Petition asks the Court to ignore the clear pronouncement of Section 1391(c) by pointing to a different subsection, Section 1391(a), which begins "Except as otherwise provided by law." Petitioner and its *amici* argue that this provision voids any and all relevance of Section 1391(c) and its clear definition of "resides" for this inquiry. But the House Report on the 2011 amendments indicated that "except as otherwise

provided by law" in the newly enacted version of Section 1391(a) referred to a list of statutes compiled by the American Law Institute, which notably did not include Section 1400(b). Gugliuzza and La Belle at 22, citing H.R. Rep. No. 112-10 at 16 n.8 (2011). Petitioner acknowledges that there is no contrary statutory language anywhere in the United States Code that would render the definitions of Section 1391(c) inapplicable to the venue purpose of the patent and copyright venue statute – Section 1400. Instead, Petitioner relies exclusively on judge-made law. As shown in the following section, Petitioner's reliance is misplaced.

B. The Supreme Court's Precedent from 1892 Does Not Constitute A Definition "Otherwise Provided By Law"

Petitioner argues that the Supreme Court defined "resides" for purposes of Section 1400 in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957). *Fourco* did consider the interpretation of Section 1400(b). It did not, however, create a special definition of "resides" for purposes of Section 1400. Instead, the *Fourco* Court examined whether the venue provisions of Section 1400 were "supplemented" by the general venue provisions of Section 1391 (at that time). The Court held that they were not. But at that time, Section 1391(c) did not define "resides" for all venue purposes as it does now.

The *Fourco* Court held that "resident" in Section 1400, which had been changed from "inhabitant," was synonymous for venue purposes with "domicile," and that all these terms, in respect to corporations, mean the state of incorporation only. *Fourco*, 353 U.S. at

226. For this assertion, the *Fourco* Court relied on an earlier case, *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892).

In *Shaw*, the Court considered the meaning of "inhabitant" for venue purposes. Specifically, the Court considered the general venue provisions applicable to corporations, which at that time referred to venue over a party in the "district whereof he is an inhabitant." *Shaw*, 145 U.S. at 449. Thus, in *Shaw*, the Supreme Court considered the meaning of "inhabitant" as used in all venue statutes. Congress had given no express definition of the term. In *Fourco*, the Court, held that "resident" or "resides" had the same meaning as "inhabitant" in venue statutes and thus applied that meaning to Section 1400(b).

At least by 2011, Congress expressly rejected the statutory interpretation of *Shaw* by stating a different, express definition of "resides" for all venue purposes. Thus, to the extent it could have remained applicable, *Shaw* was overruled by Congress in its 2011 amendment of Section 1391(c). To the extent *Fourco* retained any force at that time, it too was necessarily overruled as relates to the definition of "resides" for venue purposes.

Petitioner's argument rests solely on the contention that Section 1391(a) recites that the applicability of the section is "[e]xcept as otherwise provided by law." The only law "otherwise provided" that Petitioner identifies is the Supreme Court's *Fourco* decision. That decision, however, merely relied upon the 1892 *Shaw* definition of "inhabitant" (and therefore "resident" or "resides") for venue purposes. Congress expressly enacted a contrary definition of "resides" for all venue purposes

in 2011, overruling the only "otherwise provided" law that could possibly support the interpretation advanced by Petitioner and its *amici*.

II. CONGRESS HAS RECOGNIZED THAT PETITIONER'S INTERPRETATION THAT SECTION 1391(c) DOES NOT APPLY TO SECTION 1400(b) WOULD IMMUNIZE FOREIGN DEFENDANTS.

As shown in the preceding sections, Petitioner and its *amici* advance an incorrect interpretation of Section 1400 contradicting the clear statutory language. Additionally, Petitioner's argument leads to a nonsensical consequence – it would prevent all actions against foreign infringers in U.S. Courts.

Petitioner argues that the definition of residency "for all venue purposes" in Section 1391(c)(2) applies for all venue purposes except for those described in Section 1400(b). Petitioner and its *amici* argue that no part of Section 1391(c) may be considered in interpreting and applying Section 1400(b). As discussed at length above and in the parties' briefs, Section 1391(c)(2) defines residency for entities that are not natural persons. But Section 1391(c)(3) provides an additional important provision that "a defendant not resident in the United States may be sued in any judicial district . . . ." When correctly interpreted, this provision defines residency in Section 1400(b) for foreign defendants and makes clear where they are subject to suit in the United States.

The Petition argues, however, that Section 1391(c)(3) may not be considered (as no provision of Section 1391(c) may be considered) in interpreting

Section 1400(b).[2] Thus, under Petitioner's argument, if a patent infringer neither resides in any judicial district, nor has a regular and established place of business in any judicial district, then there is no venue where a suit for patent infringement may be brought against that infringer. It seems beyond debate that Congress did not intend to enact a provision that immunized foreign actors for piracy of U.S. intellectual property. Indeed, such a provision would create a bizarre and perverse incentive for business to flee the United States to avoid liability through the nonsensical loophole created by Petitioner's proposed interpretation.

Since Section 1391 was amended in 2011, Congress has considered other amendments to that provision and to Section 1400(b). These proposed amendments and the commentary surrounding them confirm that Petitioner's interpretation of the statute as it stands today is simply wrong. For example, in proceedings of the House Judiciary Committee in 2015, members considered possible amendments to Section 1400(b). Representative Goodlatte, for example, offered amendment language to Section 1400(b) that would recite a variety of bases for venue for patent infringement. The first 2 are similar (though different in critical respects) to current Section 1400(b):

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[2] During oral argument before the Court of Appeals, Petitioner's counsel was asked how its argument would apply to foreign defendants. Petitioner asserted that Section 1391(c)(3) would address this situation. But this concession admits the fundamental flaw in Petitioner's argument. Petitioner argues that Section 1391(c) cannot supplement or define any aspect of venue for Section 1400, but then concedes the opposite – that Section 1391(c) must supplement Section 1400 for foreign defendants.

"(1) where the defendant has its principal place of business or is incorporated; (2) where the defendant has committed an act of infringement of a patent in suit and has a regular and established physical facility." Amendment In The Nature Of A Substitute to H.R. 9, Offered by Mr. Goodlatte of Virginia, at 19 (attached hereto as Appendix A). Congressman Goodlatte went on to add other possible categories, however, including critically: "(7) for foreign defendants that do not meet the requirements of paragraphs (1) or (2), according to section 1391(d) of this title."[3] Congressman Goodlatte recognized that to achieve the interpretation of Section 1400(b) advanced here by Petitioner, the law would have to be amended by Congress. He further recognized that without specifying a mechanism for venue over foreign defendants, there would be an absurd loophole in the venue statute. The Petition effectively asks this Court to both 1) amend the statute without Congress, and 2) create an absurd loophole that Congress did not and would not intend.

III. PETITIONER'S *AMICI* FALSELY ACCUSE U.S. COURTS OF CORRUPTION AS AN EXCUSE TO EFFECT CHANGES THAT UNDULY BURDEN PATENT HOLDERS

In two *amicus* briefs submitted in support of Petitioner, the named *amici*, including significant technology companies and entities like the Electronic Frontier Foundation, suggest that some U.S. Courts, and one court in particular, have somehow engaged in

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[3] H.R. 9, the bill to which this amendment was proposed, has not advanced through the House of Representatives at the time of this brief.

corrupt behavior. Indeed, *amici* the Electronic Frontier Foundation, *et al.* explicitly accuse the judges of the U.S. District Court for the Eastern District of Texas of "forum selling." EFF Brief at 15; Brief of 48 Internet Companies, Researchers and Associations at 17. As an initial matter, such assertions are highly inappropriate and inflammatory. They also make no sense in the context of this case, since the venue at issue in the Petition is the District of Delaware. The above *amici* justify their accusations on the premise that venue reforms are needed to promote efficiency and relieve strain on the judicial system. *See, e.g.*, Brief of 48 Internet Companies, Researchers and Associations at 25 (naming inefficiency an "evil" of forum shopping). But if this is so, such reform is a matter for Congress, not this Court. Moreover, the claim by *amici* that their proposed judicial venue reform legislation will result in greater efficiency is false. The practical outcome from their efforts will make it harder to hold them accountable for wrongdoing, increasing the burdens on inventors and all patent plaintiffs that seek an efficient resolution of a dispute on the merits.

Patent holders, such as the *amici* represented herein, often must seek the assistance of the Courts to vindicate their rights. Accused infringers, including many of the *amici* supporting Petitioner are often large corporations with substantial resources. Inventors and patent holders seek efficient means to resolve their disputes with accused infringers who often refuse to even discuss licensing with a patent holder unless a lawsuit has been filed. Patent holders often seek an efficient venue for resolution of such disputes. The U.S. District Court for the Eastern District of Texas is one venue that has proven to be efficient and

expeditious in bringing such cases to resolution. Regrettably, many accused infringers seek to avoid expeditious and efficient resolution of the dispute on the merits in order to utilize the cost of litigation as economic leverage against relatively less wealthy inventors and patent holders. Indeed, in an article published by Portfolio Media, practitioners were advised on ways to knock out suits in East Texas. *See* Coe, *4 Ways to Knock Out A Frivolous Patent Suit In East Texas*, Portfolio Media, Inc., Nov. 9, 2015.[4] One piece of advice offered by a practitioner was to seek transfer of cases to other districts. The practitioner noted that "If cases get transferred to the home districts of defendants, they could be scattered throughout the country, putting an additional burden on the plaintiff's counsel." *Id.* Such advice reveals that far from seeking efficient resolution of disputes, many entities seek to make the matter less efficient and more burdensome to patent holders.

The data confirms that efficiency, rather than outcomes, drives the popularity of the U.S. District Court of the Eastern District of Texas for patent filings. Though Petitioner's *amici* rely on a study by Professors Brian Love and James Yoon, that study actually concluded that plaintiff-sided outcomes are *not* the driving force behind the Eastern District's popularity. Brian J. Love & James C. Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, Stan. Tech. L. Rev. Vo. 20:1 at 20 (January 3, 2017), https://papers.ssrn.com/sol3/papers

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[4] Available at http://www.law360.com/ip/articles/723519?nl_pk=4e82f1c3-27f3-4d47-bf94-04f5e8f2aec6&utm_source=newsletter&utm_medium=email&utm_campaign=ip

2.cfm?abstract_id=2835799 (last visited February 24, 2017). The data shows instead that from January 2014 to June 2016, patent cases in the Eastern District concluded six months faster than those in the District of Delaware, and close to two months faster than the national median. *Id.* at 14. Further, the Eastern District's median time-to-trial was over two months faster than the next fastest court and was five months faster than the nationwide median. *Id.* Overall, the Eastern District resolved 4,963 patent cases in a median of 188 days. By comparison, the District of Delaware resolved 2,493 in a median of 400 days, the Central District of California resolved 982 cases in 251 days, and the nation-wide median was 237 days. *Id.* This data suggest that far from less-costly litigation, what Petitioners and their *amici* seek is a system that makes litigation **more** expensive, and thus presumably more difficult for inventors and patent holders to pursue.[5]

Contrary to the assertions of several *amici,* the Eastern District of Texas also effectively resolves venue disputes. In this metric, the U.S. District Court for the

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[5] The study's authors suggest that the rules of the Eastern District of Texas make litigation more expensive for defendants because certain discovery activities are addressed earlier in the case. But the study simply assumes this counterintuitive conclusion. For example, the study notes that in the Eastern District of Texas, document exchange proceeds largely without formal requests for production. Far from making litigation more costly, this procedure reduces the costs of preparing and responding to such formal requests, and likely reduces discovery disputes about such requests and the costs attendant to litigating such disputes. The authors present no empirical data to show that the effective procedural rules employed in the Eastern District of Texas increase costs for litigants on either side.

Eastern District of Texas performs favorably in comparison to the U.S. District Court for the District of Delaware, the venue most likely to experience substantial increases in filings under the new venue rule advocated by Petitioner (because a significant percentage of corporations are incorporated in the state of Delaware). From 2008 to 2016, the Eastern District of Texas took an average of 183 days to grant a motion to transfer venue from the time it was filed. Steve Brachman, *Transferring Venue: How Long Is This Gonna Take?* Patent Infringement Blog (Jan. 17, 2017), http://docketreport.blogspot.com/2017/01/transferring-venue-how-long-is-this.html (last visited February 24, 2017). Over the same time period, the District of Delaware took an average of 184.5 days, a virtual tie. *Id.* This is impressive considering that the Eastern District of Texas granted 279 motions in that period, while the District of Delaware granted only 88 such motions. *Id.* In contrast with efficiency, outcomes were virtually identical. *Id.* (the Eastern District denied 57% of motions filed during the eight-year period, while Delaware denied 55%). These data show not only that the concerns about the Eastern District of Texas are greatly overblown, but that 1) a mechanism already exists to address potentially inconvenient venue in the Eastern District of Texas – 28 U.S.C. § 1404, and 2) that mechanism is working.

IV. PETITIONER'S INTERPRETATION COULD LEAD TO PERVERSE UNINTENDED CONSEQUENCES

Advocacy for a more inefficient system is hardly something that this Court should countenance, though that is precisely what Petitioner and its *amici* seek. Without an efficient system for resolving disputes, the Constitutional right to hold a patent quickly loses its value and ceases to be the "fuel of interest" about which Lincoln spoke. The policy change urged by Petitioner and its *amici* would reverse the capability our system has evolved to effectively resolve high volumes of patent lawsuits. It would also reverse Congress's venue solution for foreign corporations that commit acts of infringement in the United States but lack an established place of business here.

Smaller inventors and patent holders rely upon the same venue statutes as do all other plaintiffs. Patent holders and inventors often seek to bring suit in their home venue because it can be less costly and more efficient. Petitioners and their *amici* seek to make this impossible. Suggestions of abuse by patent "trolls" (often used as a pejorative term to refer to anyone holding a patent that someone is infringing) does not call for the Court to establish new venue rules to help tilt the balance in favor of patent infringers. Furthermore, a decision here that Section 1391(c) does not apply to Section 1400(b) "could impact venue law outside the patent context." Gugliuzza and La Belle at 27. Citing ERISA cases as an example, commentators have observed that a victory for the Petitioner and its *amici* would provide corporations with "ammunition to argue that Congress should limit venue in civil cases

across the board, just like in patent cases." *Id.* Congress has the power to strike the proper balance between protecting the rights of patent holders and preventing undue harm to corporations accused of infringement. Although some *amici* undoubtedly seek only to improve our system by advocating for a change in the law, this is a case where judicial intervention is likely to do more harm than good.

CONCLUSION

The Petition advocates an interpretation of statutory venue provisions that conflicts with the express language enacted by Congress, that leads to absurd results, and that would create inefficiency and unnecessary burdens on patent holders and the Courts. For all of these reasons, *amici* support denial of the Petition.

Dated: March 8, 2017

Respectfully submitted,

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